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IN THE

# Supreme Court of the United States

October Term, 1979

No. 79-1002

WILLIAM C. MARCHIONDO,
Petitioner,

-VS-

HONORABLE RICHARD B. TRAUB, DISTRICT JUDGE,
Respondent.

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

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IN THE

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October Term, 1979

No._____

WILLIAM C. MARCHIONDO,
Petitioner,

-vs-

HONORABLE RICHARD B. TRAUB, Distirct Judge,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF NEW MEXICO

For his petition that a writ of certiorari issue to review the mandate of the Supreme Court of the State of New Mexico, William C. Marchiondo shows the Court the following.

## OPINIONS BELOW

Mr. Marchiondo sought a writ of prohibition in the New Mexico Supreme Court against Judge Traub, the respondent. The New Mexico Supreme Court denied the petition in an "Order" opinion appended hereto as Appendix A. The normal practice of the New Mexico Supreme Court is not to publish "Order" opinions in the official and unofficial reports. A copy of the order entered by respondent which was the object of the writ of prohibition proceeding is appended hereto as "Appendix B".

## JURISDICTION

Judge Traub's order was entered on October 2, 1979. Thereafter, on October 3, 1979, Mr. Marchiondo filed a petition for writ of prohibition with the New Mexico Supreme Court seeking to prohibit

enforcement of the order. After a hearing before the New Mexico Supreme Court on October 10, 1979, and the subsequent submission of briefs relating to whether a state court is a "court of competent jurisdiction" within the meaning of the Privacy Act at 5 U.S.C. Section 552a(b)(11), the New Mexico Supreme Court denied the petition on November 13, 1979.

A motion for rehearing was not requested because under Rule 19(a) of the Rules of Appellate Procedure for Civil Cases and Rules Governing Original Proceedings in the Supreme Court of New Mexico, rehearing is limited to ". . . the points of law or fact which movant believes the court has overlooked or misapprehended . . ." The facts before the New Mexico Supreme Court were not in dispute and the legal question before the Court was thoroughly briefed by the petitioners and real parties in interest. Furthermore, in view of the conclusory nature of the New Mexico Supreme Court's opinion, petitioner could not possibly know on what basis to seek rehearing.

The New Mexico Supreme Court granted Mr. Marchiondo's motion to stay enforcement of the order for a period of thirty days on November 21, 1979. The stay was granted to allow petitioner an opportunity to petition this Court for a writ of certiorari.

The statutory provision believed to confer jurisdiction on this Court to review the order of the New Mexico Supreme Court by writ of certiorari is 28 U.S.C. Section 1257(3). See, *Madruga v. Superior Court*, 346 U.S. 556, n. 1, 98 L.Ed. 290, 74 S.Ct. 298 (1954); *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8, 76 L.Ed. 136, 52 S.Ct. 103 (1931); *Michigan Central R.R. Co. v. Mix*, 278 U.S. 492, 73 L.Ed. 470, 49 S.Ct. 207 (1929); *St. Louis, Brownsville & Mexico Ry Co. v. Taylor*, 266 U.S. 200, 69 L.Ed. 247, 45 S.Ct. 47 (1924); *Mount Vernon Colton Co. v. Alabama Power Co.*, 240 U.S. 30, 60 L.Ed. 507, 36 S.Ct. 234 (1916).



## QUESTIONS PRESENTED

1. Does the Freedom of Information Act and Privacy Act allow a state court to issue a mandatory injunction to an agency of the federal government requiring it to release information to a third party?

2. Assuming the Freedom of Information Act and Privacy Act grants state courts jurisdiction to order an agency of the federal government to release information to a third party, is the information sought in this case protected from disclosure by the Privacy Act?

3. Assuming the Freedom of Information Act and Privacy Act grants state courts jurisdiction to order an agency of the federal government to release information in its possession to a third party, what antecedent requirements, if any, must be satisfied before the state court can properly order disclosure?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### Amendement XIV

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

### Article VI

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Freedom of Information Act of 1974, as amended, 5 U.S.C. Sections 552 et seq.

Privacy Act of 1974, as amended, 5 U.S.C. Sections 552a et seq.

## STATEMENT OF THE CASE

Mr. Marchiondo filed his complaint in the district court of the Second Judicial District of the State of New Mexico on June 13, 1975. The complaint states five causes of action for libel/invasion of privacy stemming from various publications in two Albuquerque, New Mexico newspapers The defendents named are the corporate publishers of the newspapers and various employers and officials of the corporations. On May 31, 1978, a sixth cause of action was added by way of a supplemental complaint.

The sixth cause of action stems from the publication of an article headlined, "Organized Crime Showing Interest in New Mexico" with the petitioner's photograph prominently displayed immediately below the headline.

The answers of defendants assert the articles complained about are true and raise other defenses not pertinent here.

Seeking to discover evidence which would assist them in proving the truth defense they asserted to the sixth cause of action, certain defendants filed a motion for production seeking an order

> . . . requiring plaintiff to produce and permit the inspection and copying or photographing of all documents forwarded to the plaintiff up to the date of producing such documents, and which were forwarded to plaintiff, pursuant to the Freedom of Inforamtion, Privacy Act of 1974, 5 U.S.C.A. 552, 552A, 552B . . .

This motion is appended hereto as Appendix C.

The same defendants also filed a motion seeking an order requiring production of the following items:

> Any and all copies, transcripts or wire taps, tape recordings, or other recordings, made by any governmental agency from 1970 to the present containing reference to or conversations by the plaintiff, *or in the alternative requiring plaintiff to sign the appropriate authorization for release of said documents or items.*



(Emphasis added).

This motion is appended hereto as Appendix D.

At the hearings on these motions defendants indicated one purpose for seeking the "authorization" was to avoid the protections of the Privacy Act, 5 U.S.C. Sections 552a et seq. At one point they stated that once armed with the "authorization", they could seek the "order of a court of competent jurisdiction" to release the information they were seeking. Since Mr. Marchiondo's affidavit showed he did not have any of the materials (Appendix E), the defendants were forced into a posture of seeking the information from the federal government.

Judge Traub ordered Mr. Marchiondo to execute an "authorization" allowing defendants to obtain from certain federal agencies all materials and documents which he could legally obtain under the Freedom of Information and Privacy Acts. 5 U.S.C. Sections 552 et seq. This order is appended at Appendix F.

Mr. Marchiondo petitioned the New Mexico Supreme Court for an alternative writ of prohibition seeking to prevent enforcement of Judge Traub's order at Appendix F. The basis for the petition was that Judge Traub had no jurisdiction to enter the order. The arguments were varied; some were based on state law and others were based on federal law. Following oral argument on July 25, 1979, an alternative writ issued. Following the submission of briefs, the writ was made permanent. A copy of this order is appended at Appendix G. Judge Traub was permanently prohibited by the New Mexico Supreme Court from enforcing his order contained at Appendix F.

The New Mexico Supreme Court's order did not discourage the defendants for seeking this information. Undaunted, they simply scheduled the deposition of the local office of the Federal Bureau of Investigation and caused to be issued to the Federal Bureau of Investigation a subpoena duces tecum requiring that agency to produce the following items at the deposition:

(1) All documents, records, files, or materials of every nature and description in the possession, custody or control of the Federal Bureau of Investigation which the Federal Bureau of Investigation has previously agreed to deliver to William C. Marchiondo, in compliance with a request made by William C. Marchiondo under and pursuant to the Federal Freedom and Information Act, Title 5 USCA, Sections 551-556.

(2) All materials, including, but not necessarily limited to, all transcriptions of intercepted communications which the Federal Bureau of Investigation has previously agreed to deliver to or hold for review by William C. Marchiondo or by Valentino Torres filed a Motion to obtain or review in the proceeding entitled, IN THE MATTER OF AN APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING THE INTERCEPTION OF WIRE COMMUNICATIONS, NO. NDC-50, UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA.

A copy of the subpoena is appended hereto as Appendix H.

The Federal Bureau of Investigation, through Assistant United States Attorney Charles F. Sandoval, responded to the subpoena by filing a motion in Judge Traub's Court. The only objection raised was that the materials sought by the subpoena are protected by the Privacy Act, 5 U.S.C. Section 552a, et seq., and they could not be disclosed except pursuant to the "order of a court of competent jurisdiction", and the subpoena duces tecum as such did not constitute an order of the Court. The motion filed by the United States is appended at Appendix I.

A hearing was held before Judge Traub on August 23, 1979. At the hearing Assistant United States Attorney Sandoval stated the Freedom of Information - Privacy Act materials would be given to defendants if an order to that effect was made by Judge Traub. He only wanted a sufficient amount of time to collect the materials. The tapes and/or transcripts sought by the subpoena were a different matter. Mr. Sandoval took the position a F.B.I. agent could testify about the tapes, but the tapes themselves or transcripts of the tapes could not be produced at a deposition.



Mr. Marchiondo's attorneys argued the materials sought were protected by the Privacy Act, 5 U.S.C. Sections 552a et seq. and could not therefore be disclosed (there has never been any dispute about this point). The only exception possibly allowing disclosure, it was argued, is the provision contained at 5 U.S.C. Section 552a(b)(11):

> No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individuals to whom the record pertains, *unless disclosure of the record would be pursuant to the order of a court of competent jurisdiction.* (Emphasis added).

It was argued this exception did not apply to these facts under state or federal law. The arguments did not persuade Judge Traub and he entered the order contained at Appendix B.

Mr. Marchiondo once again sought an alternative writ of prohibition in the New Mexico Supreme Court. Oral arguments on the petition were heard on October 10, 1979. At the conclusion of that hearing the Court ordered Mr. Marchiondo and real parties in interest to file simultaneous briefs addressing the question of whether a state court is a court of competent jurisdiction under the Freedom of Information and Privacy Acts. 5 U.S.C. Sections 552 et seq. Briefs were filed and the New Mexico Supreme Court concluded, ". . . it is the opinion of this Court that a State Court is a court of competent jurisdiction as that term is used within the Freedom of Information Act and the Privacy Act of 1974 . . ." The petition for a writ of prohibition was denied. Appendix A.

## REASONS TO GRANT THE PETITION

The issues raised by this case are matters which have never

been addressed by this Court or, as far as petitioner can determine, by any other court in the nation. Fundamental questions concerning the relationship of the states to the federal government are raised; fundamental questions about the relationship between the Freedom of Information Act, 5 U.S.C. Sections 552 et seq., and the Privacy Act, 5 U.S.C. Sections 552a et seq. are also involved.

*A. Standing of Mr. Marchiondo.*

In *Chrysler Corp. v. Brown*, _____ U.S. _____, 60 L.Ed.2d 208, 99 S.Ct. _____ (1979) this Court concluded the FOIA does not afford a person about whom information pertains which the government may disclose to third persons a cause of action to prevent disclosure of the materials. This case is distinguishable. Mr. Marchiondo asserts standing by virtue of the Privacy Act which gives him standing to sue for the wrongful disclosure of records pertaining to him where his permission is not first obtained. 5 U.S.C. Section 552a(g)(1)(D); See, *Providence Journal Co. v. Federal Bureau of Investigation*, 460 F.Supp. 762 (D. Rhode Island 1978). Moreover, in the *Chrysler Corp.* case this court recognizes this difference between the Privacy Act and the FOIA. *Id.* at footnote 14.

The distinction is all the more apparent when we consider the Congressional findings and purposes for enacting the Privacy Act. The Act of December 31, 1974, P.L. 93-579, Section 2, 88 Stat. 1896 at Sections (a)(4) and (b)(2) states:

> The Congress finds that the right to privacy is a personal and fundamental right protected by the Constitution of the United States.
>
> * * *
>
> The purpose of this Act is to provide certain safeguards for the individual against an invasion of personal privacy by requiring Federal agencies, except as otherwise provided by law, to permit an individual to prevent records pertaining to him obtained by such agencies for a particular purpose from being used or



> made available for another purpose without his consent.

Any assertions that Mr. Marchiondo has no standing in this case should be summarily dismissed.

*B. Jurisdiction of State Courts to Enforce FOIA.*

It was argued to the New Mexico Supreme Court that Judge Traub could not be a "court of competent jurisdiction" under 5 U.S.C. Section 552a(b)(11) because the statute granting jurisdiction, 5 U.S.C. Section 552(a)(4)(B) did not waive sovereign immunity of the United States to be sued in a state court. It is apparent from the "Order" opinion of the New Mexico Supreme Court that this argument was rejected. Appendix A.

The only statute granting a third party access to government records pertaining to an individual is 5 U.S.C. Section 552(a)(4)(B). This statute provides:

> On complaint, the district court of the United States in in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

The Court has given explicit recognition to this provision on numerous occasions. For example, the majority opinion in *Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1, 39 L.Ed.2d 123, 94 S.Ct. 1028 (1974) states the district courts have jurisdiction to grant injunctive relief under the statute. The

dissent agrees with this proposition:

> The Court also properly holds that Section 552(a)(3) of the Act, which grants the District Court jurisdiction 'to enjoin from withholding agency records and to order the production of agency records improperly withheld from the complainant,' *makes that court the enforcement arm of the FOIA*. (Emphasis added).

See also, *Federal Open Market Committee of FRS v. Merrill*, _____ U.S. _____, 61 L.Ed.2d 587, 99 S.Ct. _____ (1979); *National Labor Relations Board v. Robbins Tire Co.*, 437 U.S. 214, 57 L.Ed.2d 159, 98 S.Ct. 2311 (1978); *Department of Air Force v. Rose*, 425 U.S. 352, 48 L.Ed.2d 11, 96 S.Ct. 1592 (1976); *National Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. 132, 44 L.Ed.2d 29, 95 S.Ct. 1504 (1975); *Environmental Protection Agency v. Mink*, 410 U.S. 73, 35 L.Ed.2d 119, 93 S.Ct. 827 (1973).

The question raised here is whether the statute contemplates a state court having authority to order or compel federal agencies to disclose information. The existence of concurrent jurisdiction between the federal courts and state courts to enforce federal laws has long been established. See, *Second Employer's Liability Cases*, 223 U.S. 1, 56 L.Ed. 327, 32 S.Ct. 169 (1912); *Testa v. Katt*, 330 U.S. 386, 91 L.Ed. 967, 67 S.Ct. 810 (1947). As recently as 1962 this Court stated that state courts have authority to enforce the Labor Management Relations Act of 1947 even though the jurisdictional statute, section 301(a) only expressly mentions the district courts of the United States. *Dowd Box Co. v. Courtney*, 368 U.S. 502, 7 L.Ed.2d 483, 82 S.Ct. 519 (1962).

The "test" restated by the *Dowd* opinion, raises a question of whether the same result should follow in this case. The test was enunciated as follows:

> The general question, whether State Courts can exercise concurrent jurisdiction with the Federal courts in cases arising under the Constitution, laws, and treaties



> of the United States, has been elaborately discussed, both on the bench and in published treatsies . . . [and] the result of these discussions has, in our judgment, been . . . to affirm the jurisdiction, where it is not excluded by express provision *or by incompatibility in its exercise arising from the nature of the particular case.* (Emphasis added)

It is strongly urged here that reasons of policy should prohibit states from enforcing the FOIA. We are dealing with information collected, used, disseminated, and stored by the agencies of the United States. A suit under the FOIA results in a mandatory injunction to the agency, and a refusal to comply is punishable by contempt. 5 U.S.C. Sections (a)(4)(B); (a)(4)(G). These factors, it is submitted, bring into play the long-established doctrine that instruments of the United States are immune from state control in the performance of their duties unless there is clear, unambiguous, specific authorization from Congress to the states to do so. See, *Hancock v. Train*, 426 U.S. 167, 48 L.Ed.2d 555, 96 S.Ct. 2006 (1976); *Environmental Protection Agency v. State Water Resources Control Board*, 426 U.S. 200, 48 L.Ed.2d 578, 96 S.Ct. 2022 (1976). See also, *United States v. Testain*, 424 U.S. 392, 47 L.Ed.2d 114, 96 S.Ct. 948 (1976).

In the circumstances present here, and given the nature of the case, concurrent jurisdiction between the states and federal courts would not be compatible. See, *McClung v. Sulliman*, 6 Wheat 598, 5 L.Ed. 340 (state court can't issue mandamus to an officer of the United States); Cf., *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 3 L.Ed.2d 775, 79 S.Ct. 773 (1959).

The case presents hard questions about the relationship between the states and the federal government never before resolved in the factual circumstances present here.

*C. Relationship Between FOIA and Privacy Act.*

There is an inherent tension between the FOIA and the Privacy Act. The basic objective of the FOIA, as this Court has

recognized, is public disclosure. See, *Chrysler Corp. v. Brown*, _____ U.S. _____, 60 L.Ed.2d 11, 96 S.Ct. 1592 (1976); *National Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. 132, 44 L.Ed.2d 29, 95 S.Ct. 1504 (1975). On the other hand, the dominant purpose of the Privacy Act is to prohibit disclosure. See, *Local 2047, American Federation of Government Employees v. Defense General Supply Center*, 423 F.Supp. 481 (D.C. Va. 1976), aff'd, 573 F.2d 184 (4th Cir. 1976).

There has never been any dispute that the information sought here is protected by the Privacy Act. See the definitions at 5 U.S.C. Section 552a(a). The Privacy Act states at 5 U.S.C. Section 552a(b):

> No agency shall disclose any record which is contained in a system of records by any means of communication to any person or to another agency, except pursuant to a written request by or with the prior written consent of the individual to whom the record pertains . . .

Eleven exceptions to this rule are then itemized. Only one is applicable here: Disclosure is permitted, notwithstanding the general prohibition, when such disclosure is "pursuant to the order of a court of competent jurisdiction." 5 U.S.C. Section 552(a)(b)(11). What does this phrase mean?

A search of the legislative history was for the most part unfruitful, given the manner by which Congress passed the legislation, and the last minute compromises put into the Act. See generally, The Privacy Act of 1974: An Overview and Critique, 1976 U.Wash.L. Quart. 667. Apparently, the source of this provision is the following exchange, found in the Congressional Record - House, page 36959 (Nov. 21, 1974):

> Mr. Butler. Mr. Chairman, I offer an amendment.
>
> Amendment offered by Mr. Butler: Page 23, after line 25, insert the following: '(a) pursuant to the order of a court of competent jurisdiction.'



> Mr. Butler. Mr. Chairman, this is an amendment to the section of the bill dealing with conditions of disclosure. It is introduced by the purpose of making it perfectly clear that a lawful order of a court of competent jurisdiction would be an appropriate condition of disclosure.

The Amendment passed. *Id.*

It was emphasized in arguments to the New Mexico Supreme Court that 5 U.S.C. Section 552a(b)(11) does not operate as a jurisdicitional grant; it only states that where a court "competently" posesses jurisdiction, disclosure of information pursuant to the court's order will not violate the Privacy Act. What little legislature history there is also indicates the order must be "lawful" for the exception to apply.

Where can a jurisdictional base be found? The Privacy Act contains one disclosure provision: 5 U.S.C. Section 552a(d)(1) states:

> Each agency that maintains a system of records shall upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own chosing to accompany him, to review the record and have a copy made of all or any parties thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence.

The forgoing provision of the Privacy Act is enforced by 5 U.S.C. Section 552a(g)(1)(B):

> Whenever any agency refuses to comply with an individual request under subsection (d)(1) of this section, the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this section.

The statute then becomes more specific about procedure at 5 U.S.C. Section 552a(g)(3)(A):

> In any suit brought under the provisions of subsection (g)(1)(B) of this section, the Court *may enjoin the agency from withholding the records* and order the production to the complainant of any agency records improperly withheld from him. In such a case *the court shall determine the matter de novo*, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burdens is on the agency to sustain its action. (Emphasis added).

The court can also assess reasonable attorneys fees and litigation costs if the party has "substantially prevailed." 5 U.S.C. Section 552a(g)(3)(B).

The foregoing statutes are the only provisions in the Privacy Act which give jurisdiction to a court to order disclosures of information pertaining to an individual which is covered by the Privacy Act. Several observations about these statutes are pertinent here: (1) No cause of action is given to third parties; (2) only the person about whom the information pertains can require disclosure; (3) when disclosure is refused by an agency, a civil action against the agency is permitted; (4) the district courts of the United States have jurisdiction over the cause; (5) the relief allowed is injunctive; and (6) the matter is determined de novo by the court. These five conditions plainly do not exist in the circumstances of this case. Are there any other statutes giving a jurisdictional base to courts to order the release of information kept by federal agencies?

The FOIA contains a disclosure requirement. 5 U.S.C. Section 552 (a)(3) states in pertinent part:

> [E]ach agency upon any request for records which (A) reasonably describe such records and (B) is made in accordance with published rules stating the time, place,



> fees (if any), and procedures to be obtained shall release its records promptly available to any person.

The FOIA then contains a jurisdictional base on which courts are empowered to order disclosure of information in the possession of the federal government.

If the agency refuses to disclose the information sought, 5 U.S.C. Section 552(a)(4)(B) becomes operative:

> *On complaint, the district court of the United States* in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, *has jurisdiction to enjoin the agency from withholding agency records* and to order the production of any agency records improperly withheld from the complainant. In such a case *the court shall determine the matter de novo*, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. (Emphasis added).

The United States district court may assess reasonable attorneys fees and litigation costs of the person seeking the information "substantially prevails." 5 U.S.C. Section 552(a)(4)(E).

The statute giving subject matter jurisdiction to enjoin the withholding of agency records under the FOIA is suprisingly similar to the one under the Privacy Act: (1) a civil action against the agency is permitted; (2) the district courts of the United States have jurisdiction over the cause; (3) the relief allowed is injunctive; and (4) the matter is determined de novo by the court. The only material distinction between the statute is that "any person" may sue under the FOIA while only the person about whom the information pertains may sue under the Privacy Act.

It was urged before the New Mexico Supreme Court that even

under the FOIA, Judge Traub was not acting as a "court of competent jurisdiction" in the circumstances present because the jurisdictional prerequisites to the entry of a "lawful order" were not met. *Flora v. United States*, 357 U.S. 63, 2 L.Ed.2d 1165, 78 S.Ct. 1079 (1958); *United States v. Testan*, 424 U.S. 392, 47 L.Ed.2d 114, 96 S.Ct. 948 (1976).

The case of *Lincoln National Bank v. Lampe*, 421 F.Supp. 346 (N.D. Ill. 1976) was cited to the New Mexico Supreme Court. In that case the plaintiff caused a subpoena duces tecum to be served on officials of the Federal Bureau of Investigation after its FOIA request for documents and records was denied by the FBI. The FBI had documents and records in its possession which pertained to a criminal case against the defendant, but it was not a party to the civil suit. The government filed a motion to quash the subpoena, and the motion was granted. The court held as follows:

> The court therefore concludes that Congress did intend that a *separate complaint be filed under FOIA before a federal court obtains jurisdiction* to enjoin the withholding of official information. (Emphasis added).

This conclusion was reached by analyzing the meaning of the words "on complaint." It was stated:

> The court cannot believe that when Congress expressly included a complaint as a prerequisite to FOIA action, it contemplated that this requirement could be satisfied by a pleading totally unrelated to freedom of information questions.

The case also recognized that the FOIA suit might still be pending when discovery in the suit to which the information sought might pertain is terminated. Nevertheless, filing a separate complaint under the FOIA was deemed to be a jurisdictional requirement.

The case of *Burrell v. Rodgers*, 438 F.Supp. 25 (W.D. Okl. 1977) was also cited to the New Mexico Supreme Court. In *Burrell*, plaintiff sued defendant for wrongful death. The defendant issued a subpoena duces tecum to the Acting Area Director of the



Department of Labor, Occupational Safety and Health Administration (OSHA) for materials compiled by OSHA in the course of its investigation of the incident giving rise to the action. OSHA was not a party to the civil suit. The OSHA motion to quash the subpoena was granted, following the *Lampe* rationale.

*Theriault v. United States*, 503 F.2d 390 (9th Cir. 1974) should also be studied. The plaintiff administratively requested, and was denied, Air Force agency records. Plaintiff then initiated proceedings in the federal district court to enforce the FOIA. During that proceeding plaintiff made a F.R.Civ.P. 34 motion for production of the documents, which the trial court granted. This was deemed to be error on appeal:

> The [FOIA] Act grants subject matter jurisdiction to and empowers the District Court 'to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action.' It is manifest from the face of the September order that it disobeys the mandate of the Act which requires the injunctive relief from a withholding of a given record under the claim of exemption to be predicated upon the District Court's finding of fact and conclusion of law as to the merits following a 'de novo' hearing.

The arguments contained in the *Lampe*, *Burrell*, and *Theriault* decisions did not persuade the New Mexico Supreme Court. If it is assumed a state court may act as a "court of competent jurisdiction," can it also be assumed that state courts enjoy jurisdiction under circumstances which the United States courts do not under the identical statute? See, e.g., *Satra Belarus, Inc. v. National Labor Relations Board*, 409 F.Supp. 271 (E.D. Wisc. 1976) (mandatory injunction under FOIA premature since administrative remedies are not exhausted); *Aviation Consumer Action Project v. Civil Aeronautics Board*,

370 F.Supp. 945 (D.C. D.C. 1972) (same); *Rivera v. Ford*, 440 F.Supp. 732 (D. Puerto Rico 1977) (failure to allege administrative remedies exhausted under FOIA; complaint fails to state a claim).

The order entered by Judge Traub is a pre-trial order made in the context of discovery in a state court. This court has recognized that the purpose of the FOIA is not to benefit private litigants or to be used as a private discovery tool. See, *National Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. _____, 44 L.Ed.2d 29, 95 S.Ct. 1504 (1974); *National Labor Relations Board v. Robbins Tire Co.*, 437 U.S. 214, 57 L.Ed.2d 159, 98 S.Ct. _____ (1978); *Environmental Protection Agency v. Mink*, 410 U.S. 73, 35 L.Ed.2d 119, 93 S.Ct. 827 (1973); *Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1, 39 L.Ed.2d 123, 94 S.Ct. 1028 (1974). This is because its benefits accrue to the public generally. *National Labor Relations Board v. Sears, Roebuck & Co.*, supra, at footnote 10.

The need for a separate proceeding is particularly applicable here in view of the interaction between the FOIA and Privacy Act.

The Federal Bureau of Investigation cannot release the information listed in Appendix B because the Privacy Act specifically prohibits disclosure. 5 U.S.C. Section 552(b). The FOIA states at 5 U.S.C. Section 552(b)(3):

> This section does not apply to matters that are specifically exempted from disclosure by statutes (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

In *Chrysler Corp. v. Brown*, _____ U.S. _____, 60 L.Ed.2d 208, 99 S.Ct. _____ (1979) this Court noted that the "exceptions" under the FOIA are not mandatory prohibitions to disclosure.



However, at footnote 14, Mr. Justice Rehnquist observes:

> In the [Privacy] Act Congress explicitly requires agencies to withhold records about an individual from most third parties unless the subject gives his permission.

See also, *Providence Journal Co. v. Federal Bureau of Investigation*, 460 F.Supp. 762 (D. Rhode Island 1978) which notes:

> But material exempt from mandatory disclosure under FOIA, which an agency nevertheless chooses to disclose, does implicate the permission requirement of Section 552a(b) since the disclosure of such material was not *required* by FOIA; disclosure was in the discretion of the agency.

Given the wording of 5 U.S.C. Section 552a(b), disclosure under the FOIA would be improper. See, *Belisle v. Commissioner of Internal Revenue*, 462 F.Supp. 460 (W.D. Okl. 1978) and *Chamberlain v. Kurtz*, 589 F.2d 827 (5th Cir. 1979) interpreting the privacy protection contained at 26 U.S.C. Section 6103 which is worded very similarly to the Privacy Act. See also, *Administrator, Federal Aviation Administration v. Robertson*, 422 U.S. 255, 45 L.Ed.2d 164, 95 S.Ct. 2140 (1975).

If a court can order disclosure in the FOIA proceeding notwithstanding the protection of the Privacy Act pursuant to 5 U.S.C. Section 552a(b)(11), what is the appropriate standard? The only case dealing with this question indicates that Section 552a(b)(11) allows disclosure when only for *compelling* reasons does a court specifically direct disclosure. *Stiles v. Atlanta Gas Light Co.*, 453 F.Supp. 798 (N.D. Ga. 1978).

The factual context of Judge Traub's order clearly establishes the materials ordered to be disclosed are protected by the Privacy Act; the factual context also demonstrates a belief by the New Mexico Courts that the order purportedly establishes the exception contained at 5 U.S.C. Section 552a(b)(11) as being an "order of a court of competent jurisdiction." Whether a

state court can be such a court under this provision and whether a state court can be acting as such in the circumstances present here presents important questions about the relations between the state and federal sovereigns and important questions concerning Mr. Marchiondo's privacy under the Privacy Act and the circumstances under which that privacy may be waived by a court.

## CONCLUSION

For the foregoing reasons Mr. William C. Marchiondo respectfully prays this Court to grant his petition for a writ of certiorari to review the mandate of the New Mexico Supreme Court denying him relief.

Respectfully submitted,

JACK SMITH, ESQ.

ROMERO & REVO, P.A.
By: Michael E. Vigil
3602 Campus Blvd., N.E.
Albuquerque, N.M. 87103
Phone: (505) 262-2131



## APPENDIX A

IN THE SUPREME COURT OF
THE STATE OF NEW MEXICO

WILLIAM C. MARCHIONDO,
Petitioner,
vs. NO. 12,740
HON. RICHARD B. TRAUB,
Respondent.

### ORDER

PER CURIAM.

On October 3, 1979, petitioner, William C. Marchiondo, filed a petition for writ of prohibition directed against respondent, Richard B. Traub, District Judge, requesting this Court to prohibit the respondent from enforcing two orders entered by it on October 2, 1979, as follows: (1) an order directing the Federal Bureau of Investigation to produce all materials, records and files in the possession and custody of the Federal Bureau of Investigation which it had delivered or agreed to deliver to petitioner at petitioner's request under the Freedom of Information Act, Title 5, U.S.C.A. §§ 551-556 (See § 552), and (2) an order directing the New Mexico State Police and the Albuquerque Police Department to produce certain investigative materials concerning plaintiff and providing for implementation.

On October 10, 1979, this Court held a hearing on the writ, took the case under advisement and ordered the parties to file simultaneous briefs on the issue of whether a State court is a "court of competent jurisdiction" as it pertains to the Freedom of Information Act and the Privacy Act of 1974, Title 5, U.S.C.A. § 552a(b)(11).

After having considered arguments by counsel and the briefs submitted on behalf of each of the parties, it is the opinion of this Court that a State court is a "court of competent jurisdiction" as that term is used within the Freedom of Information Act and the Privacy Act of 1974 and that the alternative writ of prohibition heretofore taken under advisement is denied, and the stay issued pending this determination is set aside.

APPENDIX B

IN THE DISTRICT COURT OF BERNALILLO COUNTY
STATE OF NEW MEXICO

WILLIAM C. MARCHIONDO,
Plaintiff,
vs
ROBERT A. BROWN, et al.,
Defendants.

No. 6-75-02838

ORDER

THIS MATTER having come before this court for Hearing on August 23, 1979 on the Motion by Charles F. Sandoval, Assistant U.S. Attorney, filed on July 5, 1979, pertaining to Paragraph 1 of the Subpoena Duces Tecum issued to Forrest Putman, et al., on June 30, 1979, and the Court having heard argument of counsel, and having reviewed the record, FINDS THAT:

1. Good cause exists for the Federal Bureau of Investigation to produce the materials specified in Paragraph 1 of defendants', Albuquerque Journal, Albuquerque Publishing Company, Tom Lang, Jerry Crawford, and Eric McCrossen, Subpoena Duces Tecum issued on June 30, 1979 and directed to Forrest Putman, et al., as follows:

> "All documents, records, files, or materials of every nature and description in the possession, custody or control of the Federal Bureau of Investigation which the Federal Bureau of Investigation has previously agreed to deliver to William C. Marchiondo, in compliance with a request made by William C. Marchiondo under and pursuant to the Federal Freedom and Information Act, Title 5 USCA, §§ 551-556."

2. Good cause exists that the expeditious production of said materials, specified in Paragraph 1 above, for purposes of inspection and/or copying by the parties herein, shall be at the offices of the Federal Bureau of Investigation or U.S. Department of Justice, in Albuquerque, New Mexico.

3. The production of said materials as specified in Paragraph 1 above appears reasonably calculated to lead to the discovery of admissible evidence.



IT IS THEREFORE ORDERED THAT the Federal Bureau of Investigation shall expeditiously produce all the materials as specified in Paragraph 1 above, for inspection and/or copying by the parties herein, and said production shall be at the offices of the Federal Bureau of Investigation or U.S. Department of Justice in Albuquerque, New Mexico.

APPENDIX C

IN THE DISTRICT COURT OF BERNALILLO COUNTY
STATE OF NEW MEXICO

WILLIAM C. MARCHIONDO,
Plaintiff,

vs. NO. 6-75-02838

ROBERT A. BROWN, RALPH LOONEY, THOMPSON H. LANG, ALBUQUERQUE PUBLISHING COMPANY (N.S.L.) JOURNAL PUBLISHING COMPANY, a corporation, NEW MEXICO STATE TRIBUNE COMPANY, a corporation, MALCOLM BOLLES, ERIC MCCROSSEN, JERRY CRAWFORD, JOHN DOE I through X, and JANE DOE I through X,
Defendants.

MOTION FOR PRODUCTION

COME NOW the defendant, Robert A. Brown, Ralph Looney, Thompson H. Lang, Albuquerque Publishing Company (N.S.L.) Journal Publishing Company, Malcolm Bolles, Eric McCrossen and Jerry Crawford by the through their attorneys, Johnson and Lanphere, P.C., and pursuant to Rule 34 of the New Mexico Rules of Civil Procedure for District Court respectfully move this Court for an Order requiring the plaintiff to produce and permit the inspection and copying or photographing of all documents forwarded to the plaintiff up to the date of producing such documents, and which were forwarded to plaintiff, pursuant to the Freedom of Information, Privacy Act of 1974, 5 U.S.C.A. 552, 552A, and 552B, and as grounds therefor state that said documents appear reasonably calculated to lead to the discovery of admissible evidence in the defense of this lawsuit.

WHEREFORE, the defendants pray for an Order of the Court requiring the plaintiff to produce and permit the inspection and copying or photographing of all documents forwarded to the plaintiff up to the date of producing such documents, and which were forwarded to plaintiff, pursuant to the Freedom of Information, Privacy Act of 1974, 5 U.S.C.A. 552, 552A, and 552B.



APPENDIX D

IN THE DISTRICT COURT OF BERNALILLO COUNTY
STATE OF NEW MEXICO

WILLIAM C. MARCHIONDO,
Plaintiff,

vs. NO. 6-75-02838

ROBERT A. BROWN, et al.,
Defendants.

MOTION FOR PRODUCTION

COME NOW the defendants, Robert A. Brown, Ralph Looney, Thompson H. Lang, Albuquerque Publishing Company (N.S.L.), Journal Publishing Company, Malcolm Bolles, Eric McCrossen and Jerry Crawford, by and through their attorneys, Johnson and Lanphere, P.C., and respectfully move this Court for an order requiring the plaintiff, William C. Marchiondo, to produce for inspection and copying the following:

1. Any and all copies, transcripts or wire taps, tape recordings, or other recordings made by any governmental agency from 1970 to the present containing reference to or conversations by the plaintiff, or in the alternative requiring the plaintiff to sign the appropriate authorization for release of said documents or items;

2. Copy of all business and social calendars of the plaintiff for the years 1970 to the present.

As grounds therefor the defendants state that the requested information and documents appear reasonably calculated to lead to the discovery of admissible evidence.

WHEREFORE, the defendants pray for an order requiring the plaintiff to produce for inspection and copying the information and documents listed in 1 and 2 above.

## APPENDIX E

STATE OF NEW MEXICO COUNTY OF BERNALILLO
IN THE DISTRICT COURT

WILLIAM C. MARCHIONDO,
Plaintiff,
vs. No. CV-75-0838
ROBERT A. BROWN, et al.,
Defendants.

### AFFIDAVIT

STATE OF NEW MEXICO )
)
COUNTY OF BERNALILLO )

BEFORE ME, the undersigned authority, authorized in cases of this nature to administer oaths, personally appeared William C. Marchiondo, whom upon being duly sworn according to law states:

1. I am the plaintiff in the cause above styled and numbered.

2. I am and have been a licensed practicing private attorney under the laws of the State of New Mexico. A true copy of the two Motions for Production filed by defendants has been provided to me for my review by my attorneys in this litigation. I do not have, nor have I maintained "social" calendars for the years 1970 to the present. The only calendar I maintain is a business desk calendar and I have none in my possession except for the years 1976, 1977, 1978 and my present one for 1979. To the extent that I maintain a business calendar reflecting appointments and conferences with my clients, those documents are subject to the attorney-client privilege and I am not free to disclose the same to anyone without the express written authorization of my clients or prospective clients.

3. I am not in possession of any information requested concerning me from the United States Government under the Freedom of Information Act or the Privacy Act.

4. I do not have in my possession, custody or control any tape recordings, or transcripts of tape recordings of telephone conversations in which my name was mentioned by other persons whose communications were intercepted by either the United States of America or the State of New Mexico, if any do exist, neither am I in possession of nor do I have in my custody or control any tape recordings or transcripts of tape recordings of intercepted wire communications containing my voice.

Further, affiant sayeth not.



## APPENDIX F

IN THE DISTRICT COURT OF BERNALILLO COUNTY
STATE OF NEW MEXICO

WILLIAM C. MARCHIONDO,
Plaintiff,
vs. No. 6-75-02838
ROBERT A. BROWN, et al.,
Defendants.

### ORDER

The defendants, Robert A. Brown, Thompson H. Lang, Albuquerque Publishing Company (N.S.L.), Journal Publishing Company, a corporation, Malcolm Bolles, Eric McCrossen and Jerry Crawford, have filed herein discovery motions for an Order which orders the plaintiff, William C. Marchiondo:

1. To produce and to execute an Authorization permitting movants to obtain from specified governmental agencies any materials which plaintiff has heretofore obtained from the said agencies named under and pursuant to the Federal Freedom of Information Act and Privacy Act, Title 5 U.S.C.A., §§555-556.

2. To execute an Authorization permitting movants to obtain from the above said governmental agencies any materials which plaintiff has the legal right to obtain from the said agencies, whether or not in fact previously sought or obtained by plaintiff, under and pursuant to the Federal Freedom of Information Act and Privacy Act, Title 5, U.S.C.A. §§ 551-556.

3. To execute an Authorization permitting movants to obtain from the appropriate governmental agency or court in custody or possession thereof, of wiretap recordings or transcripts of such recordings, of conversations between plaintiff and others or between others and concerning plaintiff, obtained or recorded pursuant to any Court Order permitting such wiretaps, where such Order was made and entered pursuant to Title 18 U.S.C.A., §§2510-2520.

4. To Execute an Authorization permitting movants to obtain from the appropriate governmental agency or Court in possession thereof, of body microphone recordings or transcripts of body microphone recordings of conversations between James Napoli and plaintiff or between James Napoli and others concerning plaintiff or concerning any interest of James Napoli in

matters relating or pertaining to the State of New Mexico, and which were recorded during the time that James Napoli was incarcerated in The Tombs correctional facility in New York City, New York during 1974 or 1975.

These motions having come on for hearing before the Court on June 8, 1979, and the Court having reviewed and considered the memorandum briefs of the parties, the oral arguments of the parties and the affidavits sumitted in connection therewith, and otherwise being fully advised in the premises, FINDS:

1. That based upon the Affidavit of the plaintiff, William C. Marchiondo, that he does not at this time have actual possession or custody of any materials which he may heretofore have been entitled to receive pursuant to the Federal Freedom of Information Act and Privacy Act, Title 5 U.S.C.A., §§551-556, that portion of the motions referred to in paragraph numbered 1, above, should be denied.

2. That as to the portion of the motions referred to in paragraphs numbered 2, 3, and 4, above:

(a) The movants have shown good cause as to why they should be entitled to obtain the materials, documents, recordings or transcripts of recordings referred to.

(b) The materials, documents, recordings or transcripts of recordings referred to are or would reasonably contain matters relevant to this lawsuit and are such as to appear reasonably calculated to lead to the discovery of admissible evidence, but that the materials, documents, recordings or transcripts of recordings should be immediately, and prior to any review thereof by defendants, their representatives or attorneys, delivered to this Court for an in camera determination by this Court, prior to releasing them to defendants' attorneys, as to whether there exists or is contained within such materials, documents, recordings or transcripts of recordings anything

(i) which unreasonably invades the personal privacy of plaintiff;

(ii) which violates the attorney-client privileges of any client of plaintiff;

(iii) or which is otherwise irrelevant or is not reasonably calculated to lead to the discovery of admissible evidence in this case.



(c) That the movants have reasonably designated that which they seek to obtain with as much specificity as circumstances permit and with, in any event, sufficient specificity as to comply with the New Mexico Rules of Civil Procedure when considered and controlled by the in camera review referred to above.

(d) That neither the Federal Freedom of Information Act and Privacy Act, Title 5 U.S.C.A., §§551-556, nor Title 18 U.S.C.A., §§2510-2520, creates any privilege against disclosure insofar as a privilege which may be asserted by plaintiff in this civil libel action, or, even if such privilege otherwise exists, such privilege, if any, insofar as being a privilege assertable by plaintiff, must, in balancing any such privilege against (i) the relevancy of the materials sought, (ii) the movants' inability after in fact independently seeking to obtain such materials, documents, recordings or transcripts of recordings from any other source or by any other method, which the Court specifically finds has been unsucessful, (iii) the fact, which the Court specifically finds to be a fact, that the matters sought go to the heart of the issues in this case, and, (iv) the fact that this is a libel case action in which plaintiff asserts that he was libeled by defendants through defendants' alleged publication of words or of plaintiff's photograph in such a manner as to create the impression that plaintiff was associated with organized crime, all weigh in favor of requiring the relief herein granted and, in balance, require the relief granted herein.

(e) That any privilege which may legally exist in favor of any federal, state or local governmental agency, under any statute or at common law, and which is properly assertable by such agency, is specifically not ruled upon by this Court for the reason that no such agency is before this Court asserting such privilege,, and nothing in this Order is intended or should be construed from preventing any such agency from raising any claim of privilege personal to it or to them or, if applicable, assertable by it or them on behalf of plaintiff, in any proceeding instituted by movants to procure, by subpoena, motion or otherwise, the materials, documents, recordings or transcripts of recordings in question.

(f) That defendants, in instituting any proceeding to pro-

cure, by written request, subpoena, motion or otherwise, the materials, documents, recordings or transcripts of recordings in question, should immediately notify plaintiff and his attorneys thereof so as to enable plaintiff to intervene or to otherwise participate in such proceeding as plaintiff is otherwise legally entitled to intervene or participate, and to assert any reason or argument against disclosure which plaintiff might be entitled to then and there advance, but subject to the finding of this Court, and insofar as such findings would be pertinent to the issues before any other Court, agency or tribunal.

NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. Plaintiff, William C. Marchiondo, will, on or before July 2, 1979, 4:30 p.m., execute in favor of movants, Robert A. Brown, Thompson H. Lang, Albuquerque Publishing Company (N.S.L.), Journal Publishing Company, a corporation, Malcolm Bolles, Eric McCrossen and Jerry Crawford, and their attorneys, Johnson and Lanphere, P.C., an Authorization in the form attached hereto as Exhibit "A", and incorporated herein by reference.

2. The materials, documents, recordings and transcripts of recordings obtained by movants pursuant to this Order will, prior to the review of same by any movant or any representative or attorney of movant, be delivered to this Court for an *in camera* inspection and review thereof by this Court and by the plaintiff or his attorneys of record, to determine if there is contained within such materials, documents, recordings or transcripts of recordings any matters, the disclosure of which (i) unreasonably invade the right of privacy of plaintiff, (ii) the disclosure of which would violate the attorney-client privilege of any client of plaintiff, or (iii) which is otherwise irrelevant or is not reasonably calculated to lead to the discovery of admissible evidence in this case.

3. That the movants, upon initiating any proceeding or request for any of the materials, documents, recordings or transcripts of recordings referred to in Exhibit A, whether by written request, subpoena, motion or otherwise, shall give timely notice to plaintiff and his attorneys so as to enable plaintiff and his attorneys to intervene or to otherwise participate in such



proceedings as plaintiff is otherwise legally entitled to participate or intervene, and to assert any reason or argument against disclosure, but that in any such proceedings the findings of this Court may be presented and relied upon by movants to the extend that such findings may be pertinent to the issues presented to any agency, court or tribunal.

4. That prior to ruling upon any right of privacy, attorney-client privilege or relevancy arising out of the *in-camera* inspection and review of the materials delivered to this Court, plaintiff, based upon his own review or that of his attorneys, provided for in this Order, may again raise any assertion of privacy, attorney-client privilege or relevance as his or his attorneys' review and inspection may dictate as is appropriate, and this Court will consider and rule upon each such assertion or allegation prior to releasing any material, document, recording or transcript of recording, or portion thereof, so delivered to the Court, to movants and their attorneys.

IN THE DISTRICT COURT OF BERNALILLO COUNTY
STATE OF NEW MEXICO

WILLIAM C. MARCHIONDO,
Plaintiff,
vs. No. 6-75-02838
ROBERT A. BROWN, et al.,
Defendants

AUTHORIZATION

I, William C. Marchiondo, plaintiff in the above captioned and numbered cause, do hereby authorize Johnson and Lanphere, P.C., 6400 Uptown Blvd. NE, Suite 200 West, Albuquerque, New Mexico, or any employee thereof, to obtain from any federal, state or local governmental agency or from any court, having possession, custody or control thereof, the following:

1. All materials or documents which I personally would have the legal right to obtain from:

(a) The Federal Bureau of Investigation.
(b) The Federal Drug Enforcement Agency.
(c) The United States Department of Justice
(d) The Federal Alcohol, Tobacco and Firearms Control Agency.

under or pursuant to a request, duly filed by me, under and pursuant to the Federal Freedom of Information Act and Privacy Act, Title 5 U.S.C.A., §§551-556.

2. All recordings or transcripts of recordings which I might personally obtain in a request or in a motion duly made or filed with any governmental agency or court of competent jurisdiction and which recordings are of conversations between myself and others or which were between others and make reference to me or about me, and which were made or recorded pursuant to a Court Order entered under and pursuant to Title 18 U.S.C.A.: §§2510-2520.

3. All recordings or transcripts of recordings made by means of a body microphone and recording device of conversations between myself and James Napoli, or conversations between James Napoli and others which mention or refer to me or to any interest of James Napoli in any event which has occurred or would occur within or affecting the State of New Mexico, and



which were recorded while James Napoli was incarcerated in The Tombs correctional facility in New York, New York in 1974 or 1975.

This authorization is given pursuant to a Court Order entered on or about June 21, 1979, in Cause No. C-75-02838 in the District Court of Bernalillo County, New Mexico, entitled "William C. Marchiondo, Plaintiff, vs. Robert A. Brown, et al.", a copy of which Order is attached hereto as Exhibit I and is incorporated herein by reference, and this authorization is given subject to all of the matters set forth in the said Exhibit I.

Date this _____ day of _____, 1979, at Albuquerque, New Mexico.

_____
WILLIAM C. MARCHIONDO

STATE OF NEW MEXICO )
) ss.
COUNTY OF BERNALILLO )

WILLIAM C. MARCHIONDO, being first duly sworn upon his oath, states: That he is the plaintiff in the above entitled matter; that he has read the foregoing Authorization and knows the contents thereof, and that the same is true of his own knowledge and information.

_____

SUBSCRIBED AND SWORN TO before me this _____ day of _____, 1979.

_____
NOTARY PUBLIC

My Commission Expires:

_____

## APPENDIX G

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO
Friday, September 7, 1979

NO. 12,586

WILLIAM C. MARCHIONDO,
Petitioner,

vs. Original Prohibition Proceeding

RICHARD B. TRAUB, District Judge,
Respondent.

This matter coming on for consideration by the Court upon amended alternative writ of prohibition, and the Court having considered the matter and taken the same under advisement;

NOW, THEREFORE, IT IS ORDERED that the amended Alternative Writ of Prohibition heretofore issued in this matter on July 25, 1979 be and the same is hereby made permanent, Mr. Chief Justice Sosa, Mr. Justice Easley and Mr. Justice Federici concurring; Mr. Justice Payne dissenting; Mr. Justice Felter not participating.



## APPENDIX H

SUBPOENA
DUCES TECUM
In the District Court of the Second Judicial District
in and for the County of Bernalillo, State of New Mexico

CASE No. 6-75-02838

WILLIAM C. MARCHIONDO,
Plaintiff,

vs.

ROBERT L. BROWN, et al,
Defendants.

THE STATE OF NEW MEXICO

To Forrest Putnam, or that employee or representative of the Federal Bureau of Investigation whom the Federal Bureau of Investigation shall designate to appear and testify in its behalf,
Federal Office Building, 5th. & Gold S.W., Albuquerque, New Mexico

*PLEASE BRING WITH YOU:* (1) All documents, records, files, or materials of every nature and description in the possession, custody or control of the Federal Bureau of Investigation which the Federal Bureau of Investigation has previously agreed to deliver to William C. Marchiondo, in compliance with a request made by William C. Marchiondo under and pursuant to the Federal Freedom and Information Act, Title 5 USCA, §§ 551-556.

(2) All materials, including, but not necessarily limited to, all transcriptions of intercepted communications which the Federal Bureau of Investigation has previously agreed to deliver to or hold for review by William C. Marchiondo or by Valentino Torres and which William C. Marchiondo and Valentino Torres filed a Motion to obtain or review in the proceeding entitled, IN THE MATTER OF AN APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING THE INTERCEPTION OF WIRE COMMUNICATIONS, NO. NDC-50, UNITED STATES DISTRICT COURT, NORTHERN DISTRICT

OF CALIFORNIA, in which proceeding the Motion, a copy of which is attached hereto as Exhibit "A" and is incorporated herein by reference, and the Government's Response to Interceptees Motion for Disclosure of Intercepted Communications, a copy of which is attached hereto as Exhibit "B" and is incorporated herein by reference, were filed.

_____, Greeting:

We command you, and each of you, to be and appear before a Court Reporter of the office, of Proctor and Potts, at Suite 304, Sandia Savings Building, Albuquerque, New Mexico on JULY 9, 1979 at the hour of 8:30 A.M. of said day to have your disposition taken. And this do ye under penalty of the Law.

WITNESS, the HONORABLE RICHARD TRAUB, Judge of said Court. and the seal thereof this 30th day of June, 1979.

(Seal) ELOISE E. YOUNG, Clerk

By /s/_____Deputy

NOTE: Subpoena issued at request of JOHNSON AND LANPHERE, P.C., Attorney for Defendants, Address: 6400 Uptown Blvd. N.E., Suite 200 W, Albuquerque, New Mexico, Telephone Number: 881-3333

STATE OF NEW MEXICO )
) ss.
County of Bernalillo )

George H. Barrows being duly sworn, upon his oath says, I am over the age of eighteen years, I served the within subpoena by delivering a copy thereof, in the county aforesaid, in person to Forrest Putman Federal Bldg on July 2, 1979

Fees: /s/_____

Subscribed and sworn to before me this 7th day of July, 1979

My Commission Expires

March 5, 1983 /s/_____
NOTARY PUBLIC



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE MATTER OF AN APPLICATION
OF THE UNITED STATES OF AMERICA
FOR AN ORDER AUTHORIZING THE
INTERCEPTION OF WIRE COMMUNICATIONS
NO. NDC-50

MOTION

COME NOW Valentino Torres and William C. Marchiondo, pursuant to Section 2518(8)(d), Title 18, United States Code, and respectfully move the Court to order the United States Government to distribute to movants any communications movants may have had regarding the following telephone numbers:
A/C 415 621-2072, A/C 415 728-3792, A/C 415 864-9406, A/C 415 861-9497.

MARCHIONDO & BERRY, P.A.
Attorneys for movants
P.O. Box 568
Albuquerque, New Mexico 87103
A/C 505 247-0751

G. WILLIAM HUNTER
United States Attorney

EDWARD D. LYONS
Special Attorney
U.S. Department of Justice
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE MATTER OF AN APPLICATION )
OF THE UNITED STATES OF AMERICA )
FOR AN ORDER AUTHORIZING THE )
INTERCEPTION OF WIRE COMMUNICATIONS )
_____ )

GOVERNMENT'S RESPONSE TO INTERCEPTEES' MOTION FOR DISCLOSURE OF INTERCEPTED COMMUNICATIONS

Valentino Torres and William C. Marchiondo have filed a motion under 18 U.S.C. 2518(8)(d) seeking disclosure of their wire communications intercepted pursuant to this Court's order No. NDC-50.

Movant Torres was intercepted pursuant to order No. NDC-50 during telephone calls taking place as follows:

(a) At 1:05 p.m. on July 21, 1977 over 415/728-3792

(b) At 6:00 p.m. on July 24, 1977 over 415/728-3792

Movant Marchiondo was intercepted pursuant to order No. NDC-50 during telephone calls taking place as follows:

(a) At 1:56 p.m. on July 5, 1977 over 415/861-9497

(b) At 4:56 p.m. on July 15, 1977 over 415/621-2072

The government has no objection to permitting movants to review copies of tape recordings of such intercepted wire communications in which they personally took part. To schedule an appointment to conduct such review, movants should contact the Albuquerque, New Mexico office of the Federal Bureau of Investigation anytime after December 1, 1977.



APPENDIX I

STATE OF NEW MEXICO COUNTY OF BERNALILLO
IN THE DISTRICT COURT

WILLIAM C. MARCHIONDO, )
Plaintiff,
vs. ) No. 6-75-02838
ROBERT L. BROWN, et al., )
Defendants.

MOTION

Comes now the United States of America by R. E. Thompson, United States Attorney for the District of New Mexico, and Charles F. Sandoval, Assistant United States Attorney for said District, and on behalf of the Federal Bureau of Investigation would show the Court:

1. The Privacy Act of 1974, 5 U.S.C. 552a(b)(11) requires that the records requested here not be disclosed except in response to the order of a court of competent jurisdiction.

2. The subpoena duces tecum does not by itself qualify as the order of a court of competent jurisdiction.

3. If this Court determines that an order should issue here, an additional forty-five days from July 9, 1979, would be needed in order to comply with the administrative provisions found in 28 CFR 16.21 *et seq*.

WHEREFORE, the movant prays that if an order is entered requiring compliance with the subpoena duces tecum herein, the movant be given until August 23, 1979, to comply.

Supreme Court, U. S.
FILED
JAN 23 1980
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

October Term 1979

NO. 79-1002

WILLIAM C. MARCHIONDO,
Petitioner,

VS.

HONORABLE RICHARD B. TRAUB,
DISTRICT JUDGE
Respondent.

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

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IN THE

# Supreme Court of the United States

October Term 1979

NO. 79-1002

WILLIAM C. MARCHIONDO
Petitioner,

VS.

HONORABLE RICHARD B. TRAUB,
DISTRICT JUDGE
Respondent.

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXCO

Respondents respectfully pray that a Writ of Certiorari not issue to review the mandate of the Supreme Court of the State of New Mexico.

## OPINIONS BELOW

Petitioner, William C. Marchiondo, sought a Writ of Prohibition in the New Mexico Supreme Court against the Honorable Richard B. Traub, the Respondent. A copy of the Order entered by the Respondent and subject of the Writ of Prohibition is appended as Appendix A.

The New Mexico Supreme Court denied Petitioner's application for a Writ of Prohibition against the Respondent's Order. Appendix B.

## JURISDICTION

Jurisdiction is claimed by Petitioner under 28 U.S.C. §1257(3).

The Mandate of the Supreme Court of the State of New Mexico which denied Petitioner's application for a Writ of Prohibition was entered on November 13, 1979. Petitioner did not file a Motion for Rehearing in accordance with Rule 19(a) of the New Mexico Rules of Appellate Procedure in Civil Cases. Petitioner did not file a Motion for Clarification on the grounds of the Mandate, pursuant to Rule 16 of the New Mexico Rules of Appellate Procedure in Civil cases.

## QUESTION PRESENTED

Does the Federal Privacy Act, 5 U.S.C. §552a, apply, and if so, does it prohibit a state court from issuing an Order to the Federal Bureau of Investigation, requiring the Federal Bureau of Investigation to produce information in the possession of that agency, where:

1. The F.B.I. does not object or raise any statutory exemptions to the requested production of said information, nor does the F.B.I. object to the jurisdiction of the state court issuing the Order;

2. The state court issuing the Order is the same court, and in the same proceeding, in which the Petitioner filed a suit for libel; and he claims he is not now nor has he ever been associated in any way with organized crime;

3. The state court found good cause for production, and determined that the information being sought was reasonably calculated to lead to the discovery of admissible evidence;



4. The information sought was previously and voluntarily requested by Petitioner under a Freedom of Information Act request, and the F.B.I. agreed to release the information to the Petitioner pursuant to that request; but Petitioner claims that he does not now have said information in his possession;

5. Petitioner refuses to sign a consent or authorization for production of the requested information?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### UNITED STATES CONSTITUTION

#### Amendment XIV

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

#### Article VI

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

New Mexico Constitution, Article 6, §13.

Privacy Act of 1974, as amended, 5 U.S.C. Sections 552a, et seq.

## STATEMENT OF THE CASE

On June 13, 1975, William C. Marchiondo instituted a libel action in New Mexico State District Court (District Court of the County of Bernalillo) against the corporate publishers and various officers and employees of the two

daily newspapers in Albuquerque, New Mexico. One of the corporate defendants is the Journal Publishing Company which publishes the *Albuquerque Journal*. A Supplemental Complaint alleging a new cause of action was filed on May 31, 1978. This cause of action was based upon a March 26, 1977 article published by the *Albuquerque Journal*. The article was originated by the Phoenix Project of the Investigative Reporters and Editors Group. The headline of this article was "Organized Crime Showing Interest In New Mexico", and a photograph of Mr. William C. Marchiondo appeared immediately below this headline on jump page A-16. Mr. Marchiondo has denied being associated with organized crime in any way, and he doubts that it exists.

Defendants answered these allegations by admitting publication of the articles in question, but they denied that the publications were defamatory, raised the defense of truth as to the published statements or inferences, and asserted that Mr. Marchiondo was a public figure so as to bring the action within the actual malice standard.

The case then entered its discovery stage. Respondent is the District Judge presiding in this libel action. The defendants scheduled the deposition of the local office of the Federal Bureau of Investigation, and caused to be issued to the F.B.I. a subpoena duces tecum. The subpoena duces tecum required the F.B.I. to produce at the deposition the following items, which are the subject of the case before this Court:

> All documents, records, files, or materials of every nature and description in the possession, custody or control of the Federal Bureau of Investigation which the Federal Bureau of Investigation has previously agreed to deliver to William C. Marchiondo, in compliance with a request made by William C. Marchiondo under and pursuant to the Federal Freedom and [sic] Information Act, Title 5 U.S.C.A. §551-556.



A copy of the subpoena is appended hereto as Appendix C.

The Federal Bureau of Investigation, through Assistant United States Attorney, Charles F. Sandoval, responded to the subpoena by filing a Motion in Respondent's court. The F.B.I.'s Motion raised no statutory exemptions to the information sought, but it claimed that the materials could not be disclosed except pursuant to the "order of a court of competent" jurisdiction. Also in the Motion the United States Attorney stated the subpoena duces tecum, as such, did not constitute an Order of the State District Court, and therefore an Order was needed. The Motion filed by the United States Attorney is appended as Appendix D.

On August 23, 1979 a hearing on the F.B.I.'s Motion was held before Respondent. At the hearing, Assistant United States Attorney Sandoval stated that the subpoenaed material, which is the subject of the case before this Court, would be produced for defendants if an Order to that effect was entered by the State District Court. No statutory exemption to the information was claimed, and no lack of jurisdiction was raised by the F.B.I. through the United States Attorney at the hearing.

The discovery Order by Respondent was entered and a copy is appended as Appendix A. Mr. Marchiondo sought an alternative Writ of Prohibition in the New Mexico Supreme Court to block enforcement of Respondent's Order. The Petition for Writ of Prohibition was denied on November 13, 1979 by the New Mexico Supreme Court. A copy of the order is appended as Appendix B.

Previously, on September 7, 1979 the New Mexico Supreme Court entered an Order, Appendix E, prohibiting enforcement of an Order, Appendix F, entered by Respondent. This Order entered by Respondent required Mr. Marchiondo to sign an authorization for release of information in possession of the Federal Government. Defendants filed a Motion for Clarification of this New Mexico Supreme Court Order. Appended as Appendix G. The Motion was taken under advisement pending the decision of the New Mexico Supreme Court on the Order which is now before this Court. The Motion for Clarification was rendered moot by a New Mexico Supreme Court Order, Appendix H, based upon its decision on the Order which is now before this Court.

## ARGUMENT TO DENY WRIT OF CERTIORARI

The discovery Order before this Court only affects these two civil litigants; the principles of concurrent jurisdiction and court of competent jurisdiction have been established; the principle that the Privacy Act does not limit civil discovery is established; and the Respondent's Order conforms to the existing statutory and case law.

### *A. REVIEW OF A DISCOVERY ORDER*

The discovery Order before this Court requires the production of only certain information which the Federal Bureau of Investigation had previously agreed to deliver to Petitioner, pursuant to a prior Freedom of Information Act request voluntarily made by Petitioner. Petitioner claims this information is not now in his possession. Appendix E to Petitioner's Brief for Certiorari. The discovery Order was not issued under or pursuant to the Freedom of Information Act. The Order is not an F.O.I.A. request. Despite Petitioner's claim, Respondent is not



enforcing the Freedom of Information Act. Petitioner's Brief for Certiorari at 9.

This case only presents discovery procedures between two private civil litigants in a libel suit. The F.B.I. is not objecting to the discovery Order as entered. The reference to F.O.I.A. in the Order was used to categorize the requested information, so that the F.B.I. could segregate out only those documents for production. The Order is not a request for any and all documents which the F.B.I. has ever obtained pertaining to the Petitioner. Therefore, Petitioner seeks to have this Court review discovery procedures in civil litigation. None of the elements for a Writ of Certiorari are thereby present.

### *B. PRIVACY ACT DOES NOT PREVENT DISCOVERY IN THIS CASE*

Assuming the Privacy Act is applicable, it is straightforward. The only section before this Court is:

> (b) Conditions of disclosure. No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the records pertain, unless disclosure of the record would be . . .
>
> (11) pursuant to the order of a court of competent jurisdiction. 5 U.S.C. 552a(b) (11)

This section, 5 U.S.C. 552a(b) (11), of the Privacy Act, has been previously reviewed by lower courts, and the consistent result is that the Privacy Act does not prevent civil or criminal discovery. *United States v. Brown*, 562 F. 2d 1144 (9th Cir. 1977); *Stiles v. Atlanta Gas Light Company*, 453 F. Supp. 798 (N.D. Ga. 1978); *Christy v. United*

*States*, 68 F.R.D. 375 (N.D. Tex. 1975). Apparently, Petitioner overlooked the *Brown* and *Christy* decisions. The statute and the case law are not confusing or in conflict meriting review by this Court on a Writ of Certiorari.

*C. CONCURRENT JURISDICTION AND COURT OF COMPETENT JURISDICTION*

The F.B.I., in its Motion, raised the Privacy Act, 5 U.S.C. 552a(b) (11), and the Respondent issued his Order ordering the production of:

> All documents, records, files, or materials of every nature and description in the possession, custody or control of the Federal Bureau of Investigation which the Federal Bureau of Investigation has previously agreed to deliver to William C. Marchiondo, in compliance with a request made by William C. Marchiondo under and pursuant to the Federal Freedom and [sic] Information Act, Title 5 U.S.C.A. §551-556. Appendix A.

The state court in question is a court of original and general jurisdiction in the State of New Mexico. New Mexico Constitution, Art. 6, §13.

Petitioner agrees that the fundamental question of the existence of concurrent jurisdiction between the federal and state courts to enforce federal laws has long been established. Petitioner's Brief for Certiorari at 10. Petitioner, in referring to the phrase, "court of competent jurisdiction," rhetorically asks, "What does this phrase mean?" Petitioner's Brief for Certiorari at 12. This ground has already been plowed, and the meaning of the phrase, when used in federal laws, has long been established to include state courts of general jurisdiction. *Ruth v. Westinghouse Credit Co.*, 373 F. Supp. 468 (W.D. Okl. 1974); *Mid-*



*Continent Pipeline Co. v. Hargrave*, 129 F. 2d 655 (10th Cir. 1942); *Duval v. Protes*, 51 F. Supp. 967 (E.D. N.Y. 1942); *Powell v. Rhine*, 71 F. Supp. 953 (M.D. Penn. 1947); *Miller v. Municipal Court of City of Los Angeles*, 22 Cal. 2d 818, 142 P. 2d 297 (Sup. Ct. 1942); *Hall v. Chaltis*, 31 A. 2d 699 (D.C. Mun. Ct. App. 1947); *Stringer v. Griffin Grocery Co.*, 149 S.W. 2d 158 (Tex. Ct. Civ. App. 1941).

Section 552a(b) (11) became part of the Privacy Act when it was offered as an amendment by Congressman Caldwell Butler from Roanoke, Virginia. The Congressional Record, House, November 21, 1974, pg. 36955, reflects the amendment to the Act.

> Mr. BUTLER. Mr. Chairman, I offer an amendment. The Clerk read as follows:
>
> Amendment offered by Mr. Butler: Page 23, after line 25, Insert the following:
>
> '(9) pursuant to the order of a court of competent jurisdiction.'
>
> Mr. BUTLER. Mr. Chairman, this is an amendment to the section of the bill dealing with conditions of disclosure. It is introduced for the purpose of making is perfectly clear that a lawful order of a court of competent jurisdiction would be an appropriate condition of disclosure.

No other written legislative history exists concerning the amendment.

Petitioner would have this Court believe that Congressman Caldwell Butler's amendment to the Privacy Act is an exclusive grant of jurisdiction to the federal courts. Petitioner's interpretation is not correct. Well settled principles of federal jurisdiction prohibit such a finding.

It is a principle of importance that the federal courts are courts of limited jurisdiction. Most state courts are courts of general jurisdiction and the presumption is that they have jurisdiction over a particular controversy unless a showing is made to the contrary. The federal courts on the other hand cannot be courts of general jurisdiction. They are empowered to hear only those cases that (1) are within the judicial power of the United States, as defined in the Constitution [Article 3, Section 2], and (2) that have been entrusted to them by a jurisdictional grant by the Congress. *Wright & Miller Federal Practice and Procedure*, §3522, at pg. 44.

From the First Judiciary Act [of September 24, 1789 Stat. 76 §9], to the present, the Congress has provided in the Judicial Code, that in certain instances jurisdiction of the federal courts shall be exclusive of the courts of several states. Federal jurisdiction *is not exclusive unless the Congress chooses to make it so, either expressly or by fair implication. Wright and Miller Federal Practice and Procedure*, §3527, at pg. 120 (Emphasis added); See *Local 100 of United Ass'n of Journeymen and Apprentices v. Borden*, 373 U.S. 690, 83 S. Ct. 1423, 10 L. Ed. 638 (1963); *Charles Dowd Box Co. v. Courtney*, 28 U.S. 379, 82 S. Ct. 519, 7 L. Ed. 483 (1962).

It is readily apparent from several legislative acts that when Congress has intended to bestow exclusive jurisdiction on the federal courts, it has been done so with specificity and particularity. Examples of such specific and particular grants of exclusive jurisdiction are:

1. 28 U.S.C. §1334, where Congress provided:

   > The district courts shall have original jurisdiction, exclusive of the courts of the states of all matters and proceedings in bankruptcy.



2. U.S.C. §1338, where regarding patents, Congress provided:

   > The district court shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents . . . Such jurisdiction shall be exclusive of the courts of the states in patents. . . .

3. 18 U.S.C. §3231, where Congress explicitly provided:

   > The district court of the United States shall have original jurisdiction exclusive of the courts of the States, of all offenses against the laws of the United States.

These legal principles have long been established and do not give rise to a Writ of Certiorari.

### *D. CASE IS LIMITED ON ITS OWN FACTS*

Petitioner states that, "In the circumstances present here, and given the nature of the case, concurrent jurisdiction between the states and federal courts would not be compatible." Petitioner's Brief for Certiorari at 11. A look at the "circumstances present here" reveals:

1. The F.B.I. and the United States Attorney's office raised no statutory exemptions to the information, nor did they oppose the jurisdiction of the state court;

2. The state court is the same court which Petitioner feels is "competent" to preside over his libel action. The court found good cause for the production of the documents, and determined that the information sought was reasonably calculated to lead to the discovery of admissible evidence;

3. The discovery Order is limited to materials, ". . . which the Federal Bureau of Investigation has previously agreed to deliver to William C. Marchiondo under and pur-

suant to the Federal Freedom and [sic] Information Act, Title 5 U.S.C.A. §551-556", Appendix A; and

4. Petitioner was requested, but refused to sign, an authorization or consent for the information;

What better case of "compatibility" could exist? The case before this Court raises no "hard" questions. This case is limited to its own facts by, ". . . the circumstances present here, and given the nature of the case, . . ." as stated by the Petitioner himself. Petitioner's Brief for Certiorari at 11. Because the case is limited to its own facts, it is not a case for a Writ of Certiorari.

*E. STANDING OF MR. MARCHIONDO*

On the one hand, Petitioner says his case is distinguishable from *Chrysler Corp. v. Brown*, ——U.S.——, 99 S. Ct. 1705, 60 L. Ed. 2d 208 (1979), because Petitioner, ". . . asserts standing by virtue of the Privacy Act . . ." On the other hand, the thrust, if not the heart of the Petition, is the extrapolation and discussions of F.O.I.A. sections dealing with the procedures when an agency refuses to disclose information. The F.B.I. is not refusing to disclose the information.

The Freedom of Information Act is exclusively a disclosure statute, and it does not afford Petitioner any private right to enjoin agency disclosure. *Chrysler Corp., supra.* Petitioner agrees with these conclusions. Petitioner's Brief for Certiorari at 8.

Paragraph B. under Reasons to Grant the Petition, is labeled, "Jurisdiction of State Courts to Enforce F.O.I.A." Petitioner's Brief for Certiorari at 9. If Petitioner is asserting a claim under F.O.I.A. he has no standing to do so.



If Petitioner is here under the Privacy Act he should limit his argument to the Act and standing would not be an issue. Just because the requested material was at one time previously and voluntarily requested by Petitioner, under the F.O.I.A., does not give him standing under the Privacy Act. *Chrysler Corp., supra.*

*F. DISCOVERY ORDER LACKS FINALITY*

Petitioner, William C. Marchiondo, claims jurisdiction under 28 U.S.C. §1257 which provides for review by appeal or Certiorari from "final judgments or decrees rendered by the highest courts in the state in which decisions could be had . . .". Petitioner's Brief for Certiorari at 2. The Order before this Court is a discovery Order.

It has long been recognized that discovery Orders are not "final" judgments so as to be appealable prior to the final disposition of the underlying case. *Alexander v. United States*, 201 U.S. 117, 26 S. Ct. 356, 60 L. Ed. 686 (1906); *Cobbledick v. United States*, 309 U.S. 323, 60 S. Ct. 540, 84 L. Ed. 783 (1940); *United States v. Ryan*, 402 U.S. 530, 91 S. Ct. 1580, 29 L. Ed. 2d 85 (1971).

## CONCLUSION

Based upon the foregoing reasons, Respondent respectfully prays that this Court deny the Petition for a Writ of Certiorari.

RESPECTFULLY SUBMITTED,

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## APPENDIX A

IN THE DISTRICT COURT OF
BERNALILLO COUNTY
STATE OF NEW MEXICO

WILLIAM C. MARCHIONDO,
Plaintiff,

vs. No. 6-75-02838

ROBERT A. BROWN, et al.,
Defendants.

### ORDER

THIS MATTER having come before this court for Hearing on August 23, 1979 on the Motion by Charles F. Sandoval, Assistant U.S. Attorney, filed on July 5, 1979, pertaining to Paragraph 1 of the Subpoena Duces Tecum issued to Forrest Putman, et al., on June 30, 1979, and the Court having heard argument of counsel, and having reviewed the records, FINDS THAT:

1. Good cause exists for the Federal Bureau of Investigation to produce the materials specified in Paragraph 1 of defendants', Albuquerque Journal, Albuquerque Publishing Company, Tom Lang, Jerry Crawford, and Eric McCrossen, Subpoena Duces Tecum issued on June 30, 1979 and directed to Forrest Putman, et al., as follows:

> "All documents, records, files, or materials of every nature and description in the possession, custody or control of the Federal Bureau of Investigation which the Federal Bureau of Investigation has previously agreed to deliver to William C. Marchiondo, in compliance with a request made by William C. Marchiondo under and pursuant to the Federal Freedom and Information Act, Title 5 USCA, §§ 551-556."

2. Good cause exists that the expeditious production of said materials, specified in Paragraph 1 above, for purposes of

inspection and/or copying by the parties herein, shall be at the offices of the Federal Bureau of Investigation or U.S. Department of Justice, in Albuquerque, New Mexico.

3. The production of said materials as specified in Paragraph 1 above appears reasonably calculated to lead to the discovery of admissible evidence.



APPENDIX B

IN THE SUPREME COURT OF
THE STATE OF NEW MEXICO

WILLIAM C. MARCHIONDO,
Petitioner,

vs. NO. 12,740

HON. RICHARD B. TRAUB,
Respondent.

ORDER

PER CURIAM.

On October 3, 1979, petitioner, William C. Marchiondo, filed a petition for writ of prohibition directed against respondent, Richard B. Traub, District Judge, requesting this Court to prohibit the respondent from enforcing two orders entered by it on October 2, 1979, as follows: (1) an order directing the Federal Bureau of Investigation to produce all materials, records and files in the possession and custody of the Federal Bureau of Investigation which it had delivered or agreed to deliver to petitioner at petitioner's request under the Freedom of Information Act, Title 5, U.S.C.A. §§ 551-556 (See § 552), and (2) an order directing the New Mexico State Police and the Albuquerque Police Department to produce certain investigative materials concerning plaintiff and providing for implementation.

On October 10, 1979, this Court held a hearing on the writ, took the case under advisement and ordered the parties to file simultaneous briefs on the issue of whether a State court is a "court of competent jurisdiction" as it pertains to the Freedom of Information Act and the Privacy Act of 1974, Title 5, U.S.C.A. § 552a(b) (11).

After having considered arguments by counsel and the briefs submitted on behalf of each of the parties, it is the opinion of this Court that a State court is a "court of competent jurisdiction" as that term is used within the Free-

dom of Information Act and the Privacy Act of 1974 and that the alternative writ of prohibition heretofore taken under advisement is denied, and the stay issued pending this determination is set aside.

IT IS THEREFORE ORDERED THAT the Federal Bureau of Investigation shall expeditiously produce all the materials as specified in Paragraph 1 above, for inspection and/or copying by the parties herein, and said production shall be at the offices of the Federal Bureau of Investigation or U.S. Department of Justice in Albuquerque, New Mexico.



APPENDIX C

SUBPOENA
DUCES TECUM

In the District Court of the Second Judicial District
in and for the County of Bernalillo, State of New Mexico

CASE No. 6-75-02838

WILLIAM C. MARCHIONDO,
Plaintiff,

vs.

ROBERT L. BROWN, et al,
Defendants.

THE STATE OF NEW MEXICO

To

Forrest Putnam, or that employee or representative of the Federal Bureau of Investigation whom the Federal Bureau of Investigation shall designate to appear and testify in its behalf,

Federal Office Building, 5th. & Gold S.W., Albuquerque, New Mexico.

*PLEASE BRING WITH YOU:* (1) All documents, records, files, or materials of every nature and description in the possession, custody or control of the Federal Bureau of Investigation which the Federal Bureau of Investigation has previously agreed to deliver to William C. Marchiondo, in compliance with a request made by William C. Marchiondo under and pursuant to the Federal Freedom and Information Act, Title 5 USCA, §§ 551-556.

(2) All materials, including, but not necessarily limited to, all transcriptions of intercepted communications which the Federal Bureau of Investigation has previously agreed to deliver to or hold for review by William C. Marchiondo or by Valentino Torres and

which William C. Marchiondo and Valentino Torres filed a Motion to obtain or review in the proceeding entitled, IN THE MATTER OF AN APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING THE INTERCEPTION OF WIRE COMMUNICATIONS, NO. NDC-50, UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, in which proceeding the Motion, a copy of which is attached hereto as Exhibit "A" and is incorporated herein by reference, and the Government's Response to Interceptees Motion for Disclosure of Intercepted Communications, copy of which is attached hereto as Exhibit "B" and is incorporated herein by reference, were filed.

————————, Greeting:

We command you, and each of you, to be and appear before a Court Reporter of the office, of Proctor and Potts, at Suite 304, Sandia Savings Building, Albuquerque, New Mexico on JULY 9, 1979 at the hour of 8:30 A.M. of said day to have your disposition taken. And this do ye under penalty of the Law.

WINESS, the HONORABLE RICHARD TRAUB, Judge of said Court, and the seal thereof this 30th day of June, 1979.

(Seal) ELOISE E. YOUNG, Clerk

By /s/————————Deputy

NOTE: Supoena isued at request of JOHNSON AND LANPHERE, P.C., Attorney for Defendants, Address: 6400 Uptown Blvd. N.E., Suite 200 W, Albuquerque, New Mexico, Telephone Number: 881-3333

STATE OF NEW MEXICO )
) ss.
County of Bernalillo )

George H. Barrows being duly sworn, upon his oath says, I am over the age of eighteen years, I served the within



subpoena by delivering a copy thereof, in the county aforesaid, in person to Forrest Putman Federal Bldg on July 2, 1979

Fees: /s/————————

Subscribed and sworn to before me this 7th day of July, 1979

My Commission Expires
March 5, 1983 /s/————————
NOTARY PUBLIC

## APPENDIX D

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
IN THE DISTRICT COURT

WILLIAM C. MARCHIONDO, )
Plaintiff,
vs. ) No. 6-75-02838
ROBERT L. BROWN, et al., )
Defendants.

MOTION

Comes now the United States of America by R. E. Thompson, United States Attorney for the District of New Mexico, and Charles F. Sandoval, Assistant United States Attorney for said District, and on behalf of the Federal Bureau of Investigation would show the Court:

1. The Privacy Act of 1974, 5 U.S.C. 552a(b) (11) requires that the records requested here not be disclosed except in response to the order of a court of competent jurisdiction.

2. The subpoena duces tecum does not by itself qualify as the order of a court of competent jurisdiction.

3. If this Court determines that an order should issue here, an additional forty-five days from July 9, 1979, would be needed in order to comply with the administrative provisions found in 28 CFR 16.21 *et seq.*

WHEREFORE, the movant prays that if an order is entered requiring compliance with the subpoena duces tecum herein, the movant be given until August 23, 1979, to comply.



## APPENDIX E

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

Friday, September 7, 1979

NO. 12,586

WILLIAM C. MACHIONDO,
Petitioner,
vs. Original Prohibition Proceeding
RICHARD B. TRAUB, District Judge,
Respondent.

This matter coming on for consideration by the Court upon amended alternative writ of prohibition, and the Court having considered the matter and taken the same under advisement;

NOW, THEREFORE, IT IS ORDERED that the amended Alternative Writ of Prohibition heretofore issued in this matter on July 25, 1979 be and the same is hereby made permanent, Mr. Chief Justice Sosa, Mr. Justice Easley and Mr. Justice Federici concurring; Mr. Justice Payne dissenting; Mr. Justice Felter not participating.

## APPENDIX F

IN THE DISTRICT COURT OF
BERNALILLO COUNTY
STATE OF NEW MEXICO

WILLIAM C. MARCHIONDO,
Plaintiff,

vs. No. 6-75-02838

ROBERT A. BROWN, et al.,
Defendant.

### ORDER

The defendants, Robert A. Brown, Thompson H. Lang, Albuquerque Publishing Company (N.S.L.), Journal Publishing Company, a corporation, Malcolm Bolles, Eric McCrossen and Jerry Crawford, have filed herein discovery motions for an Order which orders the plaintiff, William C. Marchiondo:

1. To produce and to execute an Authorization permitting movants to obtain from specified governmental agencies any materials which plaintiff has heretofore obtained from the said agencies named under and pursuant to the Federal Freedom of Information Act and Privacy Act, Title 5 U.S.C.A., §§555-556. [sic]

2. To execute an Authorization permitting movants to obtain from the above said governmental agencies any materials which plaintiff has the legal right to obtain from the said agencies, whether or not in fact previously sought or obtained by plaintiff, under and pursuant to the Federal Freedom of Information Act and Privacy Act, Title 5 U.S.C.A. §§551-556.

3. To execute an Authorization permitting movants to obtain from the appropriate governmental agency or court in custody or possession thereof, of wiretap recordings or transcripts of such recordings, of conversations between plaintiff and others or between others and concerning plaintiff, obtained or recorded pursuant to any Court Order



permitting such wiretaps, where such Order was made and entered pursuant to Title 18 U.S.C.A., §§2510-2520.

4. To Execute an Authorization permitting movants to obtain from the appropriate governmental agency or Court in possession thereof, of body microphone recordings or transcripts of body microphone recordings of conversations between James Napoli and plaintiff or between James Napoli and others concerning plaintiff or concerning any interest of James Napoli in matters relating or pertaining to the State of New Mexico, and which were recorded during the time that James Napoli was incarcerated in The Tombs correctional facility in New York City, New York during 1974 or 1975.

These motions having come on for hearing before the Court on June 8, 1979, and the Court having reviewed and considered the memorandum briefs of the parties, the oral arguments of the parties and the affidavits submitted in connection therewith, and otherwise being fully advised in the premises, FINDS:

1. That, based upon the Affidavit of the plaintiff, William C. Marchiondo, that he does not at this time have actual possession or custody of any materials which he may heretofore have been entitled to receive pursuant to the Federal Freedom of Information Act and Privacy Act, Title 5 U.S.C.A., §§551-556, that portion of the motions referred to in paragraph numbered 1, above, should be denied.

2. That as to the portion of the motions referred to in paragraphs numbered 2, 3, and 4, above:

(a) The movants have shown good cause as to why they should be entitled to obtain the materials, documents, recordings or transcripts of recordings referred to.

(b) The materials, documents, recordings or transcripts of recordings referred to are or would reasonably contain matters relevant to this lawsuit and are such as to appear reasonably calculated to lead to the discovery of admissible evidence, but that the materials, documents, re-

cordings or transcripts of recordings should be immediately, and prior to any review therof by defendants, their representatives or attorneys, delivered to this Court for an in camera determination by this Court, prior to releasing them to defendants' attorneys, as to whether there exists or is contained within such materials, documents, recordings or transcripts of recordings anything

(i) which unreasonably invades the personal privacy of plaintiff;

(ii) which violates the attorney-client privileges of any client of plaintiff;

(iii) or which is otherwise irrelevant or is not reasonably calculated to lead to the discovery of admissible evidence in this case.

(c) That the movants have reasonably designated that which they seek to obtain with as much specificity as circumstances permit and with, in any event, sufficient specificity as to comply with the New Mexico Rules of Civil Procedure when considered and controlled by the in camera review referred to above.

(d) That neither the Federal Freedom of Information Act and Privacy Act, Title 5 U.S.C.A., §§551-556, nor Title 18 U.S.C.A., §§2510-1520, creates any privilege against disclosure insofar as a privilege which may be asserted by plaintiff in this civil libel action, or, even if such privilege otherwise exists, such privilege, if any, insofar as being a privilege assertable by plaintiff, must, in balancing any such privilege against (i) the relevancy of the materials sought, (ii) the movants' inability after in fact independently seeking to obtain such materials, documents, recordings or transcripts of recordings from any other source or by any other method, which the Court specifically finds has been unsuccessful, (iii) the fact, which the Court specifically finds to be a fact, that the matters sought go to the heart of the issues in this case, and, (iv) the fact that this is a libel case action in which plaintiff asserts that he was libeled by defendants through defendants' alleged publication of words or of plaintiff's photograph in such a manner as to create



the impression that plaintiff was associated with organized crime, all weigh in favor of requiring the relief herein granted and, in balance, require the relief granted herein.

(e) That any privilege which may legally exist in favor of any federal, state or local governmental agency, under any statute or at common law, and which is properly assertable by such agency, is specifically not ruled upon by this Court for the reason that no such agency is before this Court asserting such privilege, and nothing in this Order is intended or should be construed from preventing any such agency from raising any claim of privilege personal to it or to them or, if applicable, assertable by it or them on behalf of plaintiff, in any proceeding instituted by movants to procure, by subpoena, motion or otherwise, the materials, documents, recordings or transcripts of recordings in question.

(f) That defendants, in instituting any proceeding to procure, by written request, subpoena, motion or otherwise, the materials, documents, recordings or transcripts of recordings in question, should immediately notify plaintiff and his attorneys thereof so as to enable plaintiff to intervene or to otherwise participate in such proceeding as plaintiff is otherwise legally entitled to intervene or participate, and to assert any reason or argument against disclosure which plaintiff might be entitled to then and there advance, but subject to the finding of this Court, and insofar as such findings would be pertinent to the issues before any other Court, agency or tribunal.

NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. Plaintiff, William C. Marchiondo, will, on or before July 2, 1979, 4:30 p.m., execute in favor of movants, Robert A. Brown, Thompson H. Lang, Albuquerque Publishing Company (N.S.L.), Journal Publishing Company, a corporation, Malcolm Bolles, Eric McCrossen and Jerry Crawford, and their attorneys, Johnson and Lanphere, P.C., an Authorization in the form attached hereto as Exhibit "A", and incorporated herein by reference.

2. The materials, documents, recordings and transcripts of recordings obtained by movants pursuant to this Order will, prior to the review of same by any movant or any representative or attorney of movant, be delivered to this Court for an *in camera* inspection and review thereof by this Court and by the plaintiff or his attorneys of record, to determine if there is contained within such materials, documents, recordings or transcripts of recordings any matters, the disclosure of which (i) unreasonably invade the right of privacy of plaintiff, (ii) the disclosure of which would violate the attorney-client privilege of any client of plaintiff, or (iii) which is otherwise irrelevant or is not reasonably calculated to lead to the discovery of admissible evidence in this case.

3. That the movants, upon initiating any proceeding or request for any of the materials, documents, recordings or transcripts of recordings referred to in Exhibit A, whether by written request, subpoena, motion or otherwise, shall give timely notice to plaintiff and his attorneys so as to enable plaintiff and his attorneys to intervene or to otherwise participate in such proceedings as plaintiff is otherwise entitled to participate or intervene, and to assert any reason or argument against disclosure, but that in any such proceedings the findings of this Court may be presented and relied upon by movants to the extent that such findings may be pertinent to the issues presented to any agency, court or tribunal.

4. That prior to ruling upon any right of privacy, attorney-client privilege or relevancy arising out of the *in-camera* inspection and review of the materials delivered to this Court, plaintiff, based upon his own review or that of his attorneys, provided for in this Order, may again raise any assertion of privacy, atorney-client privilege or relevance as his or his attorneys' review and inspection may dictate as is appropriate, and this Court will consider and rule upon each such assertion or allegation prior to releasing any material, document, recording or transcript of recording, or portion thereof, so delivered to the Court, to movants and their attorneys.



IN THE DISTRICT COURT OF
BERNALILLO COUNTY
STATE OF NEW MEXICO

WILLIAM C. MARCHIONDO,
Plaintiff,

vs. No. 6-75-02838

ROBERT A. BROWN, et al.,
Defendants

AUTHORIZATION

I, William C. Marchiondo, plaintiff in the above captioned and numbered cause, do hereby authorize Johnson and Lanphere, P.C., 6400 Uptown Blvd. NE, Suite 200 West, Albuquerque, New Mexico, or any employee thereof, to obtain from any federal, state or local governmental agency or from any court, having possession, custody or control thereof, the following:

1. All materials or documents which I personally would have the legal right to obtain from:

(a) The Federal Bureau of Investigation.
(b) The Federal Drug Enforcement Agency.
(c) The United States Department of Justice
(d) The Federal Alcohol, Tobacco and Firearms Control Agency.

under or pursuant to a request, duly filed by me, under and pursuant to the Federal Freedom of Information Act and Privacy Act. Title 5 U.S.C.A., §§551-556.

2. All recordings or transcripts of recordings which I might personally obtain in a request or in a motion duly made or filed with any governmental agency or court of competent jurisdiction and which recordings are of conversations between myself and others or which were between others and make reference to me or about me, and which were made or recorded pursuant to a Court Order entered under and pursuant to Title 18 U.S.C.A.: §§2510-2520.

3. All recordings or transcripts of recordings made by means of a body microphone and recording device of conversations between myself and James Napoli, or conversations between James Napoli and others which mention or refer to me or to any interest of James Napoli in any event which has occurred or would occur within or affecting the State of New Mexico, and which were recorded while James Napoli was incarcerated in The Tombs correctional facility in New York, New York in 1974 or 1975.

This authorization is given pursuant to a Court Order entered on or about June 21, 1979, in Cause No. C-75-02838 in the District Court of Bernalillo County, New Mexico, entitled "William C. Marchiondo, Plaintiff, vs. Robert A. Brown, et al.", a copy of which Order is attached hereto as Exhibit I and is incorporated herein by reference, and this authorization is given subject to all of the matters set forth in the said Exhibit I.

Date this ——— day of ———, 1979, at Albuquerque, New Mexico.

WILLIAM C. MARCHIONDO

STATE OF NEW MEXICO )
) ss.
COUNTY OF BERNALILLO )

WILLIAM C. MARCHIONDO, being first duly sworn upon his oath, states: That he is the plaintiff in the above entitled matter; that he has read the foregoing Authorization and knows the contents thereof, and that the same is true of his own knowledge and information.

SUBSCRIBED AND SWORN TO before me this ——— day of ————, 1979.

NOTARY PUBLIC

My Commission Expires:



APPENDIX G

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

WILLIAM C. MARCHIONDO,
Petitioner,
vs. No. 12,586
RICHARD B. TRAUB, District Judge Division XI, Second Judicial District, State of New Mexico,
Respondent.

*MOTION FOR CLARIFICATION OF THE RULING OF THE SUPREME COURT OF NEW MEXICO BY MEANS OF A WRITTEN OPINION, OR, ALTERNATIVELY, FOR A REHEARING*

Comes now the respondent, by and through the real parties in interest, Robert A. Brown, Thompson H. Lang, Albuquerque Publishing Company (N.S.L.), Journal Publishing Company, Malcolm Bolles, Eric McCrossen and Jerry Crawford, and respectfully moves this Court as follows:

I

For clarification of the ruling of this Court in making permanent the Amended Alternative Writ of Prohibition entered in this matter on July 25, 1979, which ruling, sought here to be clarified, was entered in this Court on September 7, 1979. Movants specifically request that the clarification of the said ruling be made by and through a written opinion of this Court setting forth the grounds upon which the said ruling was based.

In support hereof, movants would show to the Court that the original Writ of Prohibition was sought by petitioner on multiple grounds, which asserted a broad spectrum

of legal theories, some arising under common law principles, some as arising under rules of this Court, some as arising under the New Mexico Rules of Civil Procedure, and some as arising under federal statutes. Petitioner conceded in his Brief in Chief that the issues, in any event, involved a matter of public interest requiring resolution at the earliest possible moment. The present status of the record leaves the parties and the trial court in confusion as to the basis for the ruling of this Court and the status of the record is also such that movants are effectively precluded from seeking a Writ of Certiorari in the Supreme Court of the United States because of the impossibility of demonstrating to the Supreme Court of the United States that the issue before this Court was decided upon any federal ground, or, conversely, that it was not decided upon an adequate and independent state ground.

II

Alternatively, the movants would request a rehearing pursuant to Rule 19 of the Rules of Appellate Procedure for Civil Cases and Rules Governing Original Proceedings in the Supreme Court. In support of this alternative motion. the movants would show to the Court as follows:

1. This Court has misapprehended the law governing the power of a New Mexico District Judge to implement his discovery orders by logical and reasonable directives consistent with the underlying purposes of the rules of discovery and the inherent power of a Court to do all things that are reasonably necessary for the administration of justice within the scope of their jurisdiction.

2. This Court has misapprehended the law relative to any purported privilege arising under or pursuant to the Federal Freedom of Information Act - Privacy Act, 5 U.S.C., Sec. 551, et seq., under and pursuant to the Federal Act Governing Wire Interception and Interception of Oral Communications, 18 U.S.C., Secs. 2510, et seq., and the law relating or pertaining to interceptions of oral communications involving a consenting party.



3. This Court has misapprehended the law relating to the jurisdiction of a district court of the State of New Mexico over discovery matters in aid of its jurisdiction in civil matters.

(a) *Procedural Basis for Motions*

The procedural basis relied upon by movants to file the alternative motion set forth above is asserted under both Rule 16, Rules of Appellate Procedure for Civil Cases, and Rules Governing Original Proceedings in the Supreme Court, and Rule 19 of the same Rules.

Movants interpret Rule 16 as requiring a supporting brief and interpret Rule 19 as permitting a supporting brief. The brief is, therefore, being separately but simultaneously filed herewith.

## APPENDIX H

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

WILLIAM C. MARCHIONDO,
Petitioner,

vs. No. 12,586

RICHARD B. TRAUB, District
Judge, Division XI, Second
Judicial District, State
of New Mexico,
Respondent.

*ORDER*

PER CURIAM:

On September 7, 1979, this Court entered an order making the amended writ of prohibition permanent. On September 18, 1979, respondent filed a motion for clarification, or in the alternative, for a rehearing. On October 4, 1979, this Court entered an order granting the motion for clarification, but taking the matter under advisement pending further order of the Court.

This Court now having considered the motion for clarification further, it is ordered that the previous order of October 4, 1979, granting the motion for clarification is revoked and said motion is now denied on the grounds that the basis of the motion has been rendered moot by order of this Court in Cause No. 12,740.